

CITY COUNCIL AGENDA ITEM COVER MEMO

Agenda Item Number: 15.u.

Meeting Type: Regular

Meeting Date: Aug 25, 2016

Action Requested By: Legal

Agenda Type: Resolution

Subject Matter:

Settlement of lawsuit with Richard and Betty Chesnut.

Exact Wording for the Agenda:

Resolution authorizing the Mayor to enter into a Settlement Agreement and Full General Release by and among the City of Huntsville, Richard E. and Betty B. Chesnut, Denton Miemitz Realty, LLC, and Guild Building and Remodeling, LLC.

Note: If amendment, Please state title and number of the original

Item to be considered for: Action

Unanimous Consent Required: No

Briefly state why the action is required; why it is recommended; what council action will provide, allow and accomplish and; any other information that might be helpful.

Associated Cost: \$60,000.00

Budgeted Item: Not Applicable

MAYOR RECOMMENDS OR CONCURS: Yes

Department Head: 

Date: Aug 23, 2016

RESOLUTION NO. 16-_____

BE IT RESOLVED by the City Council of the City of Huntsville, Alabama, that the Mayor be, and he is hereby, authorized to execute a Settlement Agreement and Full General Release by and among the City of Huntsville, Alabama, Richard E. and Betty R. Chesnut, Denton Niemitz Realty, LLC, and Guild Building and Remodeling, LLC, which said Agreement and Release is substantially in words and figures similar to that certain document attached hereto and identified as "Settlement Agreement and Full General Release by and among the City of Huntsville, Alabama, Richard E. and Betty R. Chesnut, Denton Niemitz Realty, LLC, and Guild Building and Remodeling, LLC," consisting of seven (7) pages, with the date of August 25, 2016, appearing on the margin of the first page, together with the signature of the President or President Pro Tem of the City Council. An executed copy of said document, after being signed by the Mayor, shall be permanently kept on file in the Office of the City-Clerk Treasurer of the City of Huntsville, Alabama.

ADOPTED this the 25th day of August, 2016.

President of the City Council of
the City of Huntsville, Alabama

APPROVED this the 25th day of August, 2016.

Mayor of the City of Huntsville,
Alabama

**SETTLEMENT AGREEMENT
AND FULL GENERAL RELEASE**

This Settlement Agreement and Full General Release ("Agreement"), consisting of 7 pages, is lawfully created and executed by, between, and among Richard E. and Betty B. Chesnut (collectively, "Chesnut"), Denton Niemitz Realty, LLC ("Niemitz"), Guild Building and Remodeling, LLC ("Guild"), and the City of Huntsville, Alabama ("COH").

RECITALS

A. WHEREAS, Niemitz owns, or owned in the relevant time frame, property located at 1110 Locust Avenue, Huntsville, Alabama ("property"), such property being adjacent to a residential home owned and occupied by Chesnut;

B. WHEREAS, on or about October 24, 2012, the COH issued a permit to Niemitz, pursuant to its request, allowing for demolition of the home on the property, and on or about January 29, 2013, issued additional permits to Niemitz allowing for construction of a new residence structure, and detached garage, at the property;

C. WHEREAS, on June 3, 2013, Chesnut filed a complaint in the Circuit Court of Madison County, Civil Action Number 47-CV-2013-901203, against the COH, Niemitz, and Guild, challenging the COH's decision to issue the January 29, 2013, building permits to Niemitz ("First Action");

D. WHEREAS, on or about July 31, 2013, Chesnut also appealed the issuance of the building permits on or about January 29, 2013, to the Board of Zoning Adjustment ("BZA") for the COH, case number 8306, and further appealed the subsequent decision of the BZA in case number 8306 to the Circuit Court of Madison County, Civil Action Number 47-CV-2013-902031 ("Second Action");

E. WHEREAS, Chesnut subsequently filed notices of appeal in both the First Action and the Second Action, challenging summary judgments granted in favor of all defendants by the Circuit Court of Madison County;

F. WHEREAS, both the First and Second Action were consolidated on appeal, and such appeal was ultimately heard by the Supreme Court of Alabama;

G. WHEREAS, on January 22, 2016, the Supreme Court of Alabama issued an opinion reversing the judgment in favor of defendants in the First Action, held that the issuance of the building permits on or about January 29, 2013, violated section 73.7.4 of the zoning ordinance of the COH, and affirmed the judgment in the Second Action¹;

H. WHEREAS, upon issuance of building permits by the COH on or about January 29, 2013, Niemitz commenced construction of the new residence structure, and detached garage, at the property and completed such construction before issuance of the opinion by the Supreme

¹ Because the Supreme Court of Alabama affirmed the judgement in the Second Action, and the BZA is not a party to the First Action, the BZA is not a party to any pending civil action.

President of the City Council of the
City of Huntsville, Alabama
Date: _____

Court on January 22, 2016;

I. WHEREAS, upon remand of the First Action to the Circuit Court of Madison County, the COH issued an Official Notice of Violation of Zoning Ordinance to Niemitz, specifically referencing the decision of the Supreme Court:

Based on the decision of the Alabama Supreme Court in the case of Ex parte Chesnut, the house on your lot located at 1110 Locust Avenue is in violation of Section 73.7.4 of the Zoning Ordinance of the City of Huntsville. The house on your lot is not within five feet of the average front yard of developed lots within 100 feet of your lot. The violation on your lot is 15.51 feet.

J. WHEREAS, upon receiving an Official Notice of Violation of Zoning Ordinance, Niemitz requested that the BZA grant Niemitz a variance from section 73.7.4 of the Zoning Ordinance, arguing, among other things, innocent reliance upon the erroneous issuance of the building permits by the COH on or about January 29, 2013;

K. WHEREAS, on or about August 16, 2016, the BZA granted Niemitz the requested variance over the objection of Chesnut, such objection being part of the record of the BZA;

L. WHEREAS, Chesnut, Niemitz, and the COH wish to avoid the time, expense, and diversion of time and effort involved in continuing to litigate the First Action and the BZA's decision to grant a variance to Niemitz with respect to the property;

M. WHEREAS, the Parties wish to execute this Agreement as evidence of the final resolution of any and all disputes between them relative to the issuance of the building permits on or about January 23, 2016, the subsequent construction by Niemitz pursuant to those permits, the issuance of the variance by the BZA to Niemitz with respect to the property, and the existence and location of the current structure on the property;

N. WHEREAS, the Parties agree that this Agreement becomes voidable, at the option of the COH, if Chesnut or any other person or entity appeals, by filing with the BZA a written notice of appeal in accordance with Ala. Code § 11-52-81 (1975), or otherwise challenges the August 16, 2016, decision of the BZA to grant a variance to Niemitz with respect to the property.

W I T N E S S E T H:

NOW, THEREFORE, in consideration of the premises and covenants contained in this Agreement, and other good and valuable consideration, the parties agree as follows:

1. Recitals. The parties acknowledge, represent, and declare that the recitals set forth above are true and correct to the best of their knowledge and belief and that they are specifically incorporated herein by reference as if fully set forth.

2. City Council Approval Required. The settlement between Chesnut, Niemitz, and the COH memorialized by this Agreement is expressly subject to, and contingent upon, approval

by the Huntsville City Council at a regularly-scheduled public meeting. As such, any obligations by any party under this Agreement shall not be deemed final, operative, binding, or enforceable until such time as the Huntsville City Council, by majority vote, passes a resolution approving the settlement ("Effective Date"). In the event the Huntsville City Council declines to approve the settlement, the Agreement is null and void in all respects.

3. Voidable on Appeal. The parties intend that the settlement between Chesnut, Niemitz, and the COH memorialized by this Agreement be a final resolution of any and all disputes relative to the issuance of the building permits to Niemitz on or about January 23, 2016, the subsequent construction by Niemitz pursuant to those permits, the issuance of the variance on or about August 16, 2016, by the BZA to Niemitz with respect to the property, and the existence and location of the current structure on the property. As such, the parties agree that this Agreement shall become voidable, at the option of the COH exercised by resolution of the Huntsville City Council, if Chesnut or any other person or entity appeals, by filing with the BZA a written notice of appeal in accordance with Ala. Code § 11-52-81 (1975), or otherwise challenges the August 16, 2016, decision of the BZA to grant a variance to Niemitz with respect to the property.

4. Payment of Settlement Funds by COH. Subject to the voiding of this Agreement in accordance with paragraph 3 of this Agreement, the COH in consideration of the full general releases by Chesnut and Niemitz, the further agreement by Chesnut to dismiss the First Action as set forth in this Agreement, and the further agreement by Chesnut to not further object to or appeal the variance issued Niemitz, agrees to pay the total sum of sixty thousand dollars and no one hundreds (\$60,000.00) ("COH Settlement Funds") to Chesnut, the sufficiency of which is expressly acknowledged by Chesnut. Payment of the Settlement Funds shall be made within a reasonable time not to exceed fifteen days after the Effective Date. Such payment shall be by check made payable to Richard E. and Betty R. Chesnut. The parties understand and agree that the Settlement Funds are compensatory in nature.

5. Payment of Settlement Funds by Niemitz. Subject to the voiding of this Agreement in accordance with paragraph 3 of this Agreement, Niemitz in consideration of the full general release by Chesnut, the further agreement by Chesnut to dismiss the First Action as set forth in this Agreement, and the further agreement by Chesnut to not further object to or appeal the variance issued Niemitz, agrees to pay or have paid the total sum of fifteen thousand dollars and no one hundreds (\$15,000.00) ("Niemitz Settlement Funds") to Chesnut, the sufficiency of which is expressly acknowledged by Chesnut. Payment of the Settlement Funds shall be made within a reasonable time not to exceed fifteen days after the Effective Date. Such payment shall be by check made payable to Richard E. and Betty R. Chesnut. The parties understand and agree that the Settlement Funds are compensatory in nature.

6. Full General Release by Chesnut of the COH. Chesnut, in consideration of the payment of the COH Settlement Funds and for other good and valuable consideration stated herein, hereby releases, remises, acquits, and forever discharges the COH, and each of its boards (including, but not limited to, the BZA), authorities, commissions, committees, and departments, each of its elected or appointed officials, supervisors, employees, agents, representatives, attorneys, and any other person or entity acting by or through the COH ("COH Releasees"), of and from any and all claims, damages, demands, costs, expenses, liabilities, attorneys' fees, actions, causes of action, or suits of any nature whatsoever, whether legal or equitable, that Chesnut has or

may have, whether known or unknown, concealed or hidden, suspected or unsuspected, against the COH, or against any other person or entity, arising out of or relating to any matter, transaction, practice, policy, event, act, or failure to act that occurred at any time in the past through and including the Effective Date, including, but not limited to, any and all claims and requests for relief that were asserted or could have been asserted in the First Action or arising from the BZA's granting of the variance to Niemitz.

7. Full General Release by Chesnut of Niemitz and Guild. Chesnut, in consideration of the payment of the Niemitz Settlement Funds and for other good and valuable consideration stated herein, hereby releases, remises, acquits, and forever discharges Niemitz and Guild, and each of their members, employees, agents, representatives, attorneys, and any other person or entity acting by or through them, of and from any and all claims, damages, demands, costs, expenses, liabilities, attorneys' fees, actions, causes of action, or suits of any nature whatsoever, whether legal or equitable, that Chesnut has or may have, whether known or unknown, concealed or hidden, suspected or unsuspected, against Niemitz, Guild, or against any other person or entity, arising out of or relating to any matter, transaction, practice, policy, event, act, or failure to act that occurred at any time in the past through and including the Effective Date, including, but not limited to, any and all claims and requests for relief that were asserted or could have been asserted in the First Action or arising from the BZA's granting of the variance to Niemitz.

8. Full General Release by Niemitz and Guild of the COH. Niemitz and Guild, for other good and valuable consideration stated herein, hereby releases, remises, acquits, and forever discharges the COH Releasees of and from any and all claims, damages, demands, costs, expenses, liabilities, attorneys' fees, actions, causes of action, or suits of any nature whatsoever, whether legal or equitable, that Niemitz or Guild has or may have, whether known or unknown, concealed or hidden, suspected or unsuspected, against the COH Releasees, or against any other person or entity, arising out of or relating to any matter, transaction, practice, policy, event, act, or failure to act that occurred at any time in the past through and including the Effective Date, including, but not limited to, any and all claims and requests for relief that were asserted or could have been asserted in the First Action or arising from the BZA's granting of the variance to Niemitz.

9. Full General Release by Niemitz and Guild of Chesnut. Niemitz and Guild, for other good and valuable consideration stated herein, hereby releases, remises, acquits, and forever discharges Chesnut of and from any and all claims, damages, demands, costs, expenses, liabilities, attorneys' fees, actions, causes of action, or suits of any nature whatsoever, whether legal or equitable, that Niemitz or Guild has or may have, whether known or unknown, concealed or hidden, suspected or unsuspected, against Chesnut, or against any other person or entity, arising out of or relating to any matter, transaction, practice, policy, event, act, or failure to act that occurred at any time in the past through and including the Effective Date, including, but not limited to, any and all claims and requests for relief that were asserted or could have been asserted in the First Action.

10. No Assignment of Claims. The parties expressly represent and warrant that no claims released in this Agreement have previously been assigned to any other person or entity.

11. Dismissal of Civil Action. As soon as practicable after receipt of the settlement check, the Parties will take all actions necessary to effect the prompt dismissal, with prejudice, of

its claims in the First Action, with costs (including attorneys' fees) taxed as paid.

12. Denial of Liability or Wrongdoing. The parties understand and agree that this is a settlement and compromise of doubtful and disputed claims and is not to be considered any admission of liability by any party. To the contrary, it is understood and agreed that the COH and Niemitz generally deny any and all liability to Chesnut and each other and specifically deny the validity of all of Chesnut's claims in the First Action.

13. Attorneys' Fees. If it becomes reasonably necessary for any party to retain counsel for the purpose of enforcing or preventing the breach of any provision of this Agreement, including, but not limited to, instituting any action or proceeding to enforce any of its provisions for damages by reason of any alleged breach of any of its provisions, or for a declaration of rights or obligations under it, or for any other judicial remedy, then, if this matter is settled in favor of such party by judicial determination (which term includes arbitration judicially affirmed), such party (whether at trial or on appeal) shall be entitled, in addition to such other relief as may be granted, to be reimbursed by the breaching party for all costs and expenses incurred by it, including, but not limited to, reasonable attorneys' fee if awarded by the Court.

14. Applicable Law. This Agreement is deemed created and executed within the state of Alabama, and is to be governed, construed, interpreted, and enforced in accordance with the laws of the state of Alabama

15. Binding Agreement. This Agreement shall be binding upon, and shall inure to the benefit of, the parties, and, as applicable, their respective heirs, representatives, successors, agents, employees, and/or assigns.

16. Independent Advice of Counsel. Each party represents and warrants that it is deliberately executing this Agreement, and that in doing so it is relying solely upon its own judgment, belief, and knowledge, as well as upon the advice and recommendations of its own independently-selected counsel, concerning the terms of this Agreement as well as its rights and duties under it.

17. Interpretation of Agreement. Each party agrees that this Agreement shall be interpreted according to the plain and ordinary meaning of its terms. Additionally, each party agrees that it participated equally in the negotiation and drafting of this Agreement, and consequently, no inference shall be drawn that this Agreement was prepared by any particular party and no ambiguity shall be construed against any particular party.

18. Entire Agreement. This Agreement constitutes the entire agreement of the parties, and it supersedes any prior understandings, agreements, or representations by or among the parties to the Agreement, written or oral, to the extent they related in any way to the subject matter of this Agreement.

19. Severability. If any provision of this Agreement is deemed to be invalid or unenforceable under applicable law, this Agreement shall be considered divisible as to such provision and the same shall thereafter be inoperative; provided, however, the remaining provisions of this Agreement shall be valid and enforceable notwithstanding.

20. Modification. No oral modification of this Agreement shall be deemed valid or enforceable under any circumstances. Instead, all modifications of this Agreement shall be in writing and signed by the parties, or by their respective attorneys.

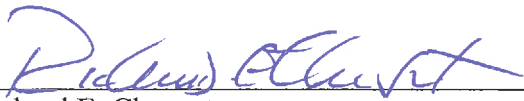
21. Counterparts. This Agreement may be executed in one or more counterparts. In this event, this Agreement shall not become effective and binding upon the parties until such time as all of the signatories have signed a counterpart.


22. Further Assurances. The parties shall execute and deliver any other documents and/or instruments and shall take any other actions as may be reasonably required or appropriate to evidence or carry out the intent and purposes of this Agreement.

23. Paragraph Headings. The paragraph headings contained in this Agreement are inserted for convenience only and shall not affect in any way the meaning or interpretation of this Agreement.

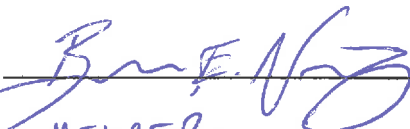
IN WITNESS WHEREOF, the parties have executed this Agreement as of the date indicated below.

Signatures on Following Page


Richard E. Chesnut

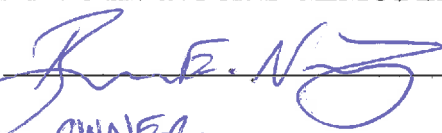

Betty B. Chesnut

DENTON NIEMITZ REALTY, LLC

BY: 
ITS: MEMBER

Date: 8/23/16

GUILD BUILDING AND REMODELING, LLC

BY: 
ITS: OWNER

Date: 8/23/16

CITY OF HUNTSVILLE, ALABAMA

BY: _____

ITS: _____

Date: _____